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CLERK

IN THE

Supreme Court of the United States

October Term, 1949

No. 156 MISC.

THE PEOPLE OF THE UNITED STATES OF AMERICA *ex rel.* HERMAN BARMORE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK, J. F. FOSTER as Warden of Auburn Prison, BOARD OF PAROLE, DEPARTMENT OF CORRECTION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the respondents in the above entitled cause, by the Attorney General of the State of New York, and oppose the petition herein and ask that it be denied.

Statement of the Case

The petitioner prays for a writ of certiorari to review an order of the Supreme Court of the State of New York,

dated February 19, 1949, dismissing petitioner's writ of habeas corpus and remanding him to the custody of the Warden of Auburn State Prison.

Petitioner appealed from this order by service of a notice of appeal, dated March 7, 1949, addressed to the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department. Thereafter and while said appeal was still pending, he moved that court on April 18, 1949, for permission to prosecute his appeal as a poor person on handwritten papers (typewritten if available to petitioner) and briefs. On April 26, 1949, his motion was denied on the ground that the papers failed to show merit to the appeal.

On May 31, 1949, the petitioner moved the New York State Court of Appeals for leave to appeal to that court *in forma pauperis*, on hand or typewritten papers on appeal. This motion was opposed by the respondents and a counter motion was made to have the appeal dismissed. The Court of Appeals granted respondents' motion on June 3, 1949. On June 22, 1949, petitioner moved the Appellate Division, Fourth Judicial Department, for an order for resubmission and rehearing on his motion to appeal on handwritten papers. This motion was denied on September 19, 1949.

Facts

Barmore was convicted in the County Court of Chemung County of the crimes of burglary, third degree, and petit larceny, and was sentenced as a second offender by that court to a definite term of twenty years. At the time of his reception at Attica Prison he owed twelve years, five months and twenty-eight days on a previous sentence to Elmira Reformatory, which by statute he was compelled to

serve before beginning the new sentence. On June 20, 1940, he was paroled on the reformatory sentence and permitted to begin service on the 1935 conviction.

The Issues

The petitioner questions (1) the authority of the Board of Parole to "halt service of the Chemung County Court judgment" and (2) charges that his commitment has been tampered with.

The respondents contend that, inasmuch as the petitioner has not exhausted his remedies in the courts of the State of New York, this is not a proper case for the application of certiorari.

POINT I

Petitioner did not exhaust his remedies in the state courts and there has been no decision on the merits by the highest court of the state in which a decision could be had.

The Constitution of the State of New York (Art. VI, § 7), defining the jurisdiction of the Court of Appeals, provides:

> "Appeals may be taken to the Court of Appeals in the classes of cases enumerated in this section. * * *.
>
> In civil cases and proceedings as follows:
>
> (1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification."

If the petitioner is correct in his contention that the case presents a question under the Constitution of the United States, he was entitled to appeal to the Court of Appeals as of right. He did not avail himself of that right and there has been no decision by the Court of Appeals upon that constitutional question.

Section 589 of the Civil Practice Act of New York authorizes appeals to the Court of Appeals by permission of the Appellate Division or by permission of the Court of Appeals, but only from an order or judgment which is not appealable as a matter of right.

An identical question concerning the jurisdiction of this Court was presented in *Morris Plan Industrial Bank of New York* v. *Graves et al.* (1941), 314 U. S. 572. This Court's decision was as follows:

> "*Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a final judgment of the highest court of the State on the constitutional question presented. The Chief Justice took no part in this decision."

In that case, the appellant, in addition to moving the Appellate Division and the Court of Appeals for leave to appeal, which motions were denied, had served notice of appeal to the Court of Appeals as of right from the final order of the Appellate Division. After the dismissal of the appeal to this Court, the appeal as of right to the Court of Appeals was brought on for argument and resulted in a decision affirming the order appealed from (288 N. Y., Mem. p. 91). Upon appeal to this Court, the appeal was dismissed for the want of a substantial Federal question (317 U. S. 591).

In the instant case, no appeal has been taken to the Court of Appeals, which merely denied as a matter of dis-

cretion a motion to vary its rules to permit an appeal to be taken upon a handwritten or typewritten record instead of a printed record.

POINT II

As a matter of law petitioner is not entitled to a writ of certiorari.

This Court may review upon a writ of certiorari a final judgment or decree in any suit "in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a suit of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity * * *." (28 U. S. C. § 344).

Petitioner prays for a writ of certiorari to review an order of the Supreme Court of the State of New York, which Court is not the highest court of the State of New York, nor does there appear to be any Federal question involved over which this Court can take jurisdiction.

The petitioner as a matter of right may appeal from the order of the Supreme Court of the State of New York to the Appellate Division of the Supreme Court of the State of New York (New York Civil Practice Act § 1274). Such an appeal has been taken and is now pending.

CONCLUSION

It is respectfully submitted that the petition should be denied.

Dated: Albany, N. Y., October 4, 1949.

Respectfully submitted,

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